Filed 2/9/10 P. v. Bey CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER WEBSTER BEY, Defendant and Appellant.	D054627 (Super. Ct. No. FSB042897)

APPEAL from a judgment of the Superior Court of San Bernardino County, Brian S. McCarville, Judge. Affirmed with directions.

Christopher Bey was charged with two robberies occurring on two different occasions. Bey represented himself at trial, and the jury acquitted him of one of the robberies. Challenging his conviction for the other robbery, he contends the trial court erred by (1) denying his motion to sever the trials of the two robberies; (2) admitting suggestive identification evidence; and (3) refusing to give a special instruction to disregard his demeanor in court. As to sentencing, he argues the court abused its

discretion in failing to dismiss his strike prior convictions. We reject his contentions of error.

The parties agree there is a clerical error in the abstract of judgment. We affirm the judgment with directions to correct the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Bey was convicted of a robbery at a liquor store in San Bernardino, and acquitted of a robbery at a mail store in Rialto. There was no dispute that the robberies occurred; the disputed issue was whether Bey was the perpetrator. To facilitate our review of Bey's assertion that trial of the two robberies should have been severed, we summarize the facts for both robberies.

Robbery of San Bernardino Liquor Store

Lee's Liquor Store in San Bernardino was robbed at about 6:55 p.m. on November 5, 2003. Employees Chong Lee and Pamela Davis were in the front of the store at the cash registers, and employee Julio Flores was stocking the cooler in the back of the store. A man entered the store, walked towards the back of the store, and asked Flores a question about the beer sold at the store. The man took three beer cans to the cash register counter, placed the beer on the counter, and gave Lee a five-dollar bill. Lee opened the register. The man pointed a gun at Lee's head, jumped over the counter, and fired a shot towards the side of Lee's head. Lee was not hit by the bullet; he laid face down on the floor and pretended he was dead. Davis sat down on the floor, and when the man was occupied with the cash register, she ran out of the store. After taking money, the man ran out of the store.

The employees described the robber as an African-American male, about 30 years old, about five feet, 10 or 11 inches to six feet tall, and weighing about 200 to 220 pounds.[1]

The robbery was depicted on a surveillance video taken at the liquor store. After reviewing the surveillance photographs, Detective Michael Hudson thought that the facial features of the robber resembled an individual who was a suspect in several other robberies. On November 12, 2003, Hudson showed two six-person photo lineups, which did not include Bey's photograph, to the employees. The employees indicated the robber was not included in the photo lineup.

On January 15, 2004, Detective Hudson saw a photograph of Bey in a newspaper article stating that Bey was wanted for a robbery committed in December 2003 in Rialto. After comparing Bey's photograph with the still photograph of the liquor store robbery, Hudson thought there was a resemblance. On January 29, 2004, he showed the employees a six-person photo lineup which included the same photograph of Bey that had been used in the newspaper article. Lee and Davis were unable to make an identification; however, Flores identified Bey. During the photo lineup, Flores told Hudson that he had seen a photograph of the suspect in a newspaper article about another robbery.

Subsequently, the court ordered a live lineup with Flores. At the live lineup on January 17, 2005, Flores failed to select Bey as the robber but instead identified another

---

1 According to the probation report, Bey is an African-American male, five feet, eight inches tall, weighing 245 pounds, who was 31 years old at the time of the offense.

individual. At trial, Flores was unable to identify Bey as the robber.[2] Lee, however, identified Bey at trial. Lee testified that although he had been unable to make an identification by looking at photographs, he was able to recognize the robber based on his facial structure when he saw him in person at trial. Davis was unable to remember what the robber looked like.

On November 7, 2003, a fingerprint lifted off the beer cans placed on the counter by the robber was entered into a computer fingerprint identification system, but no match was found.[3] In October 2004, Bey was fingerprinted by the police. In September 2005, the fingerprint examiner determined that the fingerprint from the beer can matched a fingerprint on Bey's October 2004 fingerprint card.

Robbery of Rialto Mail Store

At about 4:30 p.m. on December 1, 2003, the Pack & Mail store in Rialto was robbed. Store owner Ernie Lopez and employee Etelvina Marquez were behind the store counter at the cash registers. A man who had a brace on his leg and was walking as if he were handicapped entered the store with a "Presto . . . cooker" box secured to a dolly. Marquez tried to pick up the box but it was too heavy. The man told Marquez he had to come around the counter because the box was very heavy. The man brought the box on

---

2 When the prosecutor asked Flores if he saw the man who robbed the store in court, Flores responded, "I don't believe so." The prosecutor then asked, "Are you sure?" Flores answered, "I'm sure. I don't think so."

3 The fingerprint examiner testified that the failure to obtain a match from a computer search could be because the person's prints were not in the database, or the portions of the prints in the database were different from the portions of the print obtained at the scene.

the dolly inside the counter area. He then grabbed Marquez, put a gun to her head, and said, "[T]his is a robbery, lay down." "[D]on't move, if you scream or yell I [will] kill you." Marquez laid face down on the floor.

The robber took money that was stored in the cash register area. After he grabbed the money, the robber told Marquez and Lopez to stay down and if they got up they would be killed. The man left the store, leaving the box and dolly behind.

In a 911 call reporting the robbery, Marquez described the robber as a "short black guy," who was five feet, six or seven inches tall "at the most." She told the 911 operator he was about 45 or 50 years old, wearing a black jacket, a Levi sweater, and a black beanie and "helmet." She stated he was escaping in a "green Mitsubishi." When interviewed by the police, Marquez described the robber as a fair complexioned African-American, wearing a beanie, a black or blue coat with a hood, jeans, and a blue shirt with stripes.

The police found three bricks inside the box left at the store by the robber. A fingerprint lifted from the box matched Bey's fingerprint. On December 9, 2003, Marquez identified Bey's photograph in a six-person photo lineup. The police told Marquez that the fingerprints at the scene matched the person she had identified. At trial, Marquez identified Bey as the robber.

Defense

In defense, Bey argued that he was mistakenly identified as the perpetrator of the robberies. He pointed to various evidentiary weaknesses in the prosecution's identification evidence, including the eyewitness testimony and fingerprint evidence. He

presented expert testimony to explain factors that undermine the reliability of eyewitness identifications, including memory gaps, cross-racial identification, stress, focus on a weapon, short observation, passage of time after the event, and transference from views of a similar face.

As to the San Bernardino liquor store robbery, Bey's stepdaughter remembered that Bey had cooked dinner on the evening of November 5 (which was her brother's birthday), but she could not remember if she had seen him at home at the time of the robbery. Relevant to the Rialto mail store robbery, Bey's wife stated that their only car was a Dodge Dakota truck. She testified that Bey was with her the afternoon of December 1, 2003, and described in detail their activities that day, including picking up her check and paying bills. She stated that the Presto cooker box seized by the police at the Rialto store was her box; she had purchased the Presto cooker in November; and the box may have been discarded outside.[4]

In his arguments to the jury, Bey urged the jury to reject the evidence of a fingerprint match for the San Bernardino robbery. He noted that the authorities did not take the beer cans and preserve them as evidence, and there was no match when the fingerprints were first run through the computer system even though he believed his fingerprints were in the system. Regarding the fingerprint evidence for the Rialto

---

[4] On cross-examination, Bey's wife acknowledged she did not actually know what happened to the box.

robbery, Bey did not dispute that his fingerprint was found on the Presto cooker box, but disputed that this showed he was the perpetrator.[5]

Jury's Verdict and Sentence

For the San Bernardino robbery, Bey was charged with robbery and assault with a firearm, with enhancements for personal discharge and use of a firearm on the robbery count. For the Rialto robbery, he was charged with robbery and assault with a deadly weapon, with an enhancement for personal use of a firearm on the robbery count. The jury convicted him of the charges for the San Bernardino robbery, except it found not true the allegation that he personally discharged a firearm. The jury acquitted him of the charges for the Rialto robbery.

The trial court found true allegations that Bey had incurred three strike prior convictions, and one serious felony prior conviction. Based on his strike priors, he was sentenced under the "Three Strikes" law to an indeterminate sentence of 25 years to life on the robbery count, plus a determinate sentence of 10 years for the personal firearm use and five years for the serious felony prior conviction.

---

[5] To support the theory that his fingerprints were in the system at the time of the computer search for the San Bernardino robbery, Bey's wife testified that Bey had worked for the City of Sacramento and the city required fingerprints of its job applicants. Further, Bey pointed out that in December 2003 a fingerprint match was made for the Rialto robbery (apparently through a computer search).

DISCUSSION

I. *Denial of Severance Motion*

Prior to trial, Bey filed a motion requesting that trial of the two robberies be severed. Bey stated that in both robberies he was disputing the validity of the fingerprint evidence; i.e., for the San Bernardino liquor store robbery he was claiming the print evidence was the product of police misconduct, and for the Rialto mail store robbery he was proffering an innocent explanation for the presence of his fingerprint. He asserted that a joint trial would prejudice his defense because the jury would not be inclined to conclude that the fingerprint evidence could be erroneous in two instances; i.e., the jury would think "lightning does not strike twice." The trial court noted that the two theories challenging the fingerprint evidence were not similar, and denied the motion.

Penal Code[6] section 954 authorizes joinder of different offenses when they are of the same class of crime. "Because consolidation ordinarily promotes efficiency, the law prefers it." (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) However, the court may order separate trials "in the interests of justice and for good cause shown." (§ 954.) When (as here) the statutory requirements for joinder are met, the denial of a severance motion is not an abuse of discretion unless the defendant makes a clear showing that there was a substantial danger of prejudice requiring that the charges be separately tried. (*People v. Osband* (1996) 13 Cal.4th 622, 666; *People v. Soper* (2009) 45 Cal.4th 759, 773.) The determination of potential prejudice from joinder depends on the particular circumstances

---

6 Subsequent unspecified statutory references are to the Penal Code.

of each case. (*People v. Osband*, *supra*, 13 Cal.4th at p. 666.) Factors against joinder include: (1) evidence would not be cross-admissible in separate trials; (2) some charges are unusually inflammatory; (3) a weak case has been joined with a strong case or another weak case so that the spillover effect of aggregate evidence may alter the outcome; and (4) the charges singly or in combination implicate the death penalty. (*Ibid*.) Cross-admissibility of evidence ordinarily dispels any inference of prejudice; however, the absence of cross-admissibility does not by itself demonstrate prejudice. (*Id.* at p. 667; § 954.1.)

In determining whether there was an abuse of discretion, we examine the information available to the trial court at the time the motion was heard. (*People v. Osband*, *supra*, 13 Cal.4th at p. 667.) Further, even if a severance ruling was correct when made, we must reverse if the defendant shows the joinder actually resulted in gross unfairness amounting to a denial of due process. (*Id.* at p. 668.)

To support his position that severance should have been granted, Bey argues evidence would not have been cross-admissible at separate trials for the two robberies because the robberies were "generic commercial robberies" that shared no distinctive marks. We disagree.[7]

---

7 The trial court here did not make an express ruling concerning cross-admissibility. Drawing all inferences in favor of the court's ruling, we assume the court found the evidence cross-admissible. (See *People v. Leyba* (1981) 29 Cal.3d 591, 596-597; *People v. Manning* (1973) 33 Cal.App.3d 586, 601-602; *People v. Sutton* (1976) 65 Cal.App.3d 341, 347.)

To determine whether evidence relating to the joined offenses would be cross-admissible at hypothetical separate trials, the court applies the rules applicable to the admissibility of evidence of other, uncharged crimes. (See *People v. Soper, supra*, 45 Cal.4th at p. 776.) Other crimes evidence is admissible when relevant to prove some issue other than mere criminal propensity, and when the evidence is not unduly prejudicial under Evidence Code section 352. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203-205; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) Here, the key disputed issue was identity. For the evidence to be cross-admissible on this issue, the robberies must share a high degree of similarity; i.e., they must share common features that are sufficiently distinctive to be "'like a signature'" that sets the offenses apart from crimes of the same general variety, thereby suggesting the offenses were committed by the same perpetrator. (*People v. Ewoldt*, *supra*, at p. 403; *People v. Miller* (1990) 50 Cal.3d 954, 987.) "The inference of identity . . . need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together." (*Miller*, *supra*, at p. 987.)

Viewing the facts of the two robberies in the aggregate, the trial court could reasonably find the robberies were sufficiently similar to be admissible on the issue of identity. The robberies occurred in a one-month time span and in the same county. Both robberies involved a man who entered a business in the guise of being a customer needing assistance. Both robbers approached the employees with items that suggested they were not intending any criminal conduct (i.e., beer cans to purchase and a box to mail). Significantly, the same person's fingerprint was found on the items handled by the

robbers. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 361-362 [ballistics evidence showing same gun used in both offenses was alone probably sufficient for cross-admissibility].) The robbers in both offenses engaged in conduct designed to give them access to the area where cash was kept; i.e., giving the employee money so the register would be opened, and moving the heavy box around the counter to access the area behind the cash register. Both robbers worked alone and threatened the employees with a gun. The trial court could reasonably conclude that the similarity with regard to time frame, geographic locale, modus operandi, and fingerprint evidence was sufficiently high to support an inference that the same perpetrator was involved.

Further, in separate trials the court would not be required to exclude the robbery evidence for undue prejudice under Evidence Code section 352. Contrary to Bey's suggestion, the fact that he disputed the fingerprint evidence for both offenses did not create a risk of undue prejudice. Undue prejudice does not exist merely because highly probative evidence is damaging to the defense case, but rather arises from evidence that uniquely tends to evoke an emotional bias against the defendant or to cause the jury to prejudge the issues based on extraneous factors. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008; *People v. Branch* (2001) 91 Cal.App.4th 274, 286.) The common fingerprint found at both robberies was not evidence that would distract the jury from its task of evaluating whether Bey was the perpetrator; rather, it was simply relevant on the issue of the identity of the robber.

Given the cross-admissibility of the robbery evidence on the disputed issue of identity, the court did not err in denying the request for severance.

Alternatively, even if we assume the evidence was not cross-admissible, the court was not required to grant severance. Even when evidence is not cross-admissible, the defendant has the burden to show that the potential for prejudice from a joint trial outweighs the countervailing benefits to the state from joinder. (*People v. Soper*, *supra*, 45 Cal.4th at pp. 773, 775.) Unlike the issue of admission of other crimes evidence, when offenses are properly joined for trial the defendant's guilt of all the offenses is at issue and the problem of confusing the jury with collateral matters does not arise. (*Id*. at p. 773.) The absence of cross-admissibility is a factor suggesting possible prejudice, but countervailing considerations of efficiency and judicial economy must be weighed. (*Ibid*.) A defendant seeking severance of properly joined offenses must make a stronger showing of potential prejudice than would be necessary to exclude other crimes evidence in a severed trial. (*Id*. at p. 774.)

Bey concedes neither of the robberies involved evidence that was more inflammatory or weaker than the other. However, as he argued to the trial court, he asserts there was a prejudicial "spillover" effect because he was challenging the fingerprint evidence for both robberies and it would have been difficult for a jury to find the fingerprint evidence for both of the robberies to be unreliable. He points out that in closing argument to the jury, the prosecutor argued that it was not coincidental that his fingerprints were found on the items used by the robber to distract the employees at both robberies, and that this corroborated his guilt of both robberies.

There is no reason why the jury could not assess the legitimacy and significance of the fingerprint evidence independently for each case. Bey presented his theories

challenging the fingerprint evidence, and the jury could take each of these theories into consideration when evaluating the fingerprint evidence for each case. Indeed, the fact that the jury acquitted Bey of the Rialto robbery belies his claim that the jury could not independently decide whether one or both of the fingerprint evidentiary items should be rejected.

Notwithstanding the acquittal, Bey argues that because of the joinder, the prosecutor was in effect able to urge "the jury to use the cumulative effect of the mere existence of two cases to fill the evidentiary gaps in at least one of the cases." We are not persuaded. There is nothing in the record to suggest that there was a substantial risk that the jury's guilty verdict for the San Bernardino robbery was influenced by the fact that Bey had also been charged with the Rialto robbery. The jury's ability to reject the prosecution's evidence on the Rialto robbery shows that it understood and complied with its duty to independently evaluate the evidence concerning the San Bernardino robbery when deciding his guilt of this offense.

Bey has not carried his burden to show a substantial danger of prejudice or gross unfairness from the joinder.

II. *Admission of Eyewitness Identification Evidence*

Prior to trial, Bey moved to exclude Flores's identification of him at the photo lineup on January 29, 2004, based on a claim that the identification was tainted by Flores's previous viewing of the photograph in a newspaper article identifying him as a suspect. The lineup was prepared by Detective Hudson who had seen a Department of Motor Vehicles (DMV) photograph of Bey in a newspaper article identifying Bey as a

suspect in the Rialto robbery. Hudson used the same DMV photograph in the photo lineup shown to Flores in January 2004. At the time of the photo lineup Flores told Hudson that "possibly in December" he (Flores) had seen a picture of the suspect in a newspaper article about "another liquor store" robbery.

There were two possible pictures that Flores could have seen in the newspaper.[8] One was an unclear still photograph of the robber taken from the surveillance videotape of the San Bernardino liquor store robbery. The other was Bey's DMV photograph which appeared in several newspaper articles identifying Bey as a suspect in the Rialto mail store robbery.

Bey was arrested in October 2004. At a live lineup in January 2005, Flores identified another man as the robber, rather than selecting Bey. Thereafter, Bey moved to exclude Flores's photo lineup identification, arguing it had been tainted by the newspaper viewing. The trial court denied the motion. At trial in June 2007, Flores was unable to identify Bey as the robber.

At the hearing on the motion to exclude Flores's photo lineup identification, the prosecutor argued that the photo lineup identification should be admitted and that the issue of the prior newspaper viewing merely went to the weight of the evidence. The trial court agreed with the prosecutor, reasoning that although it was of "some concern" that Bey's photograph was disseminated in the press, when the police are looking for a suspect such dissemination occurs. The court assessed that the lineup itself was not unduly

---

[8] Bey did not cross-examine Flores about his prior viewing of the newspaper photo; thus, the issue was not clarified at trial.

suggestive, stating that even though the DMV photograph in the newspaper and in the lineup were the same, the photographs in the lineup depicted individuals who were "remarkably close" in age, weight, and facial hair. The court concluded that Flores's viewing of a photograph in the newspaper could be argued to the jury as a factor that affected credibility but it did not support exclusion of the evidence.

At trial, Bey presented the jury with the issue of the possible taint of Flores's identification by cross-examining Detective Hudson, posing a hypothetical question to the defense eyewitness identification expert, and arguing the matter in his closing arguments. Also, the trial court gave the jury a special instruction stating that a factor relevant to its evaluation of eyewitness testimony was "whether the identification of the defendant in the photographic lineup was suggestive because the photograph of the defendant was circulated in the newspaper by law enforcement before the identification of the defendant was made."

To decide whether an extrajudicial identification is so unreliable as to violate a defendant's right to due process, the court ascertains (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification was nevertheless reliable under the totality of circumstances. (*People v. Carter* (2005) 36 Cal.4th 1114, 1162.) If the challenged procedure was not impermissibly suggestive, no further inquiry is necessary. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.) Even if the procedure was unnecessary and suggestive, due process is not violated by admission of the evidence if there are sufficient indicia that the identification was reliable. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 110, 114.) That

is, even "[w]hen an eyewitness has been subjected to undue suggestion, the factfinder must nonetheless be allowed to hear and evaluate the identification testimony unless the '"'totality of the circumstances'"' suggests '"a very substantial likelihood of irreparable misidentification."'" (*People v. Arias* (1996) 13 Cal.4th 92, 168.)

Due process is not violated merely because identification evidence is not "the most reliable" because "'"[c]ounsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification--including reference to . . . any suggestibility in the identification procedure . . . ."'" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1243.) Due process concerns arise when there is a substantial risk of a "mistaken identification becoming irreparably 'fixed' and not later to be shaken by cross-examination . . . ." (*Baker v. Hocker* (9th Cir. 1974) 496 F.2d 615, 617.) Short of a " 'substantial likelihood of irreparable misidentification' . . . [identification] evidence is for the jury to weigh. . . . Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (*Manson v. Brathwaite*, *supra*, 432 U.S. at p. 116.)

The defendant bears the burden to show a constitutionally unreliable identification. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.) We independently review a trial court's determination on these issues. (*People v. Kennedy* (2005) 36 Cal.4th at p. 609; *People v. Avila* (2009) 46 Cal.4th 680, 699.)

Assuming Flores viewed the DMV photograph of Bey in the newspaper article about the Rialto robbery prior to viewing this same photograph in the photo lineup, we

agree with the trial court that this went to the weight of the evidence and did not require exclusion on due process grounds. As noted by the trial court, because Bey had been identified as a suspect in the Rialto robbery, it was not improper for the authorities to publicize his DMV photograph in the newspaper to aid in his apprehension. When the police were compiling the photo lineup for the San Bernardino robbery, Bey had not yet been arrested and there is no showing that the police had multiple photographs of Bey available to them so as to provide the option of using a photograph other than the DMV photograph. When a suggestive identification procedure is necessary to effective and proper law enforcement, this factor weighs against a finding of a due process violation. (*Simmons v. United States* (1968) 390 U.S. 377, 384-385; *Stovall v. Denno* (1967) 388 U.S. 293, 302; *People v. Blair* (1979) 25 Cal.3d 640, 660; *Baker v. Hocker*, *supra*, 496 F.2d at p. 617.) The record does not show that the use of Bey's DMV photograph in the photo lineup was unnecessary because another photograph was available to the police.

Further, several factors support the reliability of the photo lineup identification. Bey approached Flores at the liquor store and asked him a question; thus, Flores had an opportunity to view his face. On November 12, 2003, Flores did not identify Bey when shown a photo lineup that did *not* contain Bey's picture. When a different lineup was shown on January 29, 2004, now including Bey's picture, Flores identified him. This identification occurred about two and one-half months after the November 5, 2003 robbery, when the event would still have been relatively fresh in Flores's mind. When Flores subsequently failed to identify Bey at the January 2005 lineup and the June 2007 trial, it had been several years since the crime. The failure to identify in 2005 and 2007

occurred after a lengthier passage of time and does not establish the earlier 2004 photo identification was necessarily unreliable.

Bey asserts that the photo lineup identification was unreliable because Flores described the robber as five feet, 10 inches tall, weighing about 200 pounds, whereas he was five feet, eight inches tall and weighed 245 pounds. He also posits that Flores only saw the robber for a "minimal" period of time. These were factors for the jury to consider when evaluating the weight of Flores's identification, but they do not establish that the photo lineup identification was so unreliable as to require exclusion of the evidence.

Bey also asserts that unreliability is shown because "Flores unambiguously expressed that the prior viewing of appellant's photograph was in his mind as he made the identification in the photo lineup." The record does not establish this. During the hearing on his limine motion to exclude the evidence, Bey stated that according to the police report "after [Flores's] identification . . . Officer Haynes asked . . . whether he had seen newspaper articles," and Flores responded that he had seen a newspaper article sometime in December. This does not reflect that Flores expressed a concern that his identification was tainted from a newspaper article, but rather suggests that he merely responded to the detective's inquiry about seeing newspaper articles.

Bey does not dispute that the photographs set forth in the lineup itself were not suggestive vis-à-vis each other. Thus, Flores had to select the robber out of six photographs of similar-looking men. Further, there had been a time lapse of perhaps one month between Flores's viewing of a newspaper article (estimated to have occurred in

December) and his viewing of the photo lineup on January 29. Thus, the potential suggestive effect of the newspaper viewing was likely somewhat attenuated by the passage of time.

Under the totality of circumstances, Bey has not carried his burden to show an identification procedure that was unnecessarily suggestive and that created a substantial likelihood of irreparable misidentification. The jury was apprised of the possible taint arising from the prior newspaper viewing, and of Flores's subsequent failure to identify Bey at the live lineup and at trial. From this, the jury could properly decide what weight to give the photo identification evidence. There was no due process violation from the admission of the evidence.

III. *Denial of Request for Special Instruction Concerning Defendant's Demeanor*

Bey requested that the trial court instruct the jury with a special instruction which was entitled "Disregard non-testifying defendant's courtroom demeanor " and which stated: "You are admonished to disregard the defendant's appearance, demeanor or conduct in the courtroom. You must not consider it for any purpose." When discussing a similar requested instruction to disregard "suggestive body language," Bey told the court that the trial was a "most nervous situation" for him (apparently referring to his self-representation) and he did not want the jury to misinterpret this. The court denied the requested instructions, reasoning that the jury could not consider anything about him because he did not testify, and the jury was instructed not to consider the fact that he did not testify.

Bey asserts that the court erred in refusing the instruction because it was a correct statement of the law (*People v. Boyette* (2002) 29 Cal.4th 381, 434; *People v. Garcia* (1984) 160 Cal.App.3d 82, 91-92) and it was not duplicative. He contends the instruction was necessary to ensure that the jury not draw any inferences of guilt arising from his nervousness or assertiveness while he was representing himself. We disagree with these contentions.

The court may properly refuse an instruction offered by the defendant if the instruction is duplicative of other instructions; i.e., if other instructions adequately inform the jury of the principles set forth in the requested instruction. (*People v. Harrison* (2005) 35 Cal.4th 208, 253-254.) The jury was given a plethora of instructions that conveyed its duty to decide the case solely on the admitted evidence. For example, the jury was told that statements made by "the attorneys and Mr. B[e]y" are not evidence; evidence consists of "testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact"; every person who testifies under oath is a witness; the jury must decide all factual questions "from the evidence received in this trial and not from any other source"; the jury must not guess the answer to a question when an objection was sustained, must not assume an insinuation suggested by a question, and must disregard any evidence that was excluded or stricken; and the jury must not be influenced by "pity for or prejudice against the defendant."

From the standard instructions provided to them, the jurors necessarily understood that their evaluation of the case must be based solely on the evidence presented to them

and not on any other matters. There is nothing in the record to suggest that the jury might have thought that any nervousness or zealousness displayed by Bey while he was acting as his own advocate was relevant to the issue of his guilt. Jurors would understand, even without express instruction, that a nonlawyer defendant acting as his own advocate might be nervous and must vigorously present his case, and that these factors would have no bearing on whether the defendant had committed the charged offenses. Because the jurors were informed from the instructions to confine their evaluation of the case solely to the matters presented as evidence in court, the court was not required to give the special instruction telling them to disregard the nontestifying defendant's demeanor.

IV. *Failure to Dismiss Strike Prior Convictions*

Bey was found to have incurred three strike prior convictions in 1992 for attempted murder, attempted robbery, and robbery. Prior to sentencing, he requested that the court dismiss his strike prior convictions. The trial court denied his request, concluding he was not outside the spirit of the Three Strikes law. Bey challenges this ruling on appeal.

The purpose of the Three Strikes law is to impose extended punishment on defendants who have previously committed violent or serious felonies and who again commit a felony, thus showing they have not been rehabilitated or deterred from further criminal activity. (*People v. Leng* (1999) 71 Cal.App.4th 1, 14.) A trial court may dismiss a strike prior conviction if, in light of the nature and circumstances of the current and prior felony convictions and the particulars of the defendant's background, character, and prospects, the defendant is deemed outside the spirit of the Three Strikes law in

whole or in part. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) On appeal, we review the trial court's decision for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) The defendant must show that the trial court's refusal to dismiss the strike prior is so irrational or arbitrary that no reasonable person could agree with it. (*Id*. at p. 377.)

The record provides the following information about Bey's criminal history. In March 1987, when he was 15 years old, he committed theft and assault, was declared a ward of the court, and was placed in the care of his mother. In May 1987 he committed grand theft and was committed to a youth center. He escaped from the youth center on two occasions. The wardship was discharged in February 1989. In June 1991, when he was 19 years old, he was charged with inflicting corporal injury on a spouse or cohabitant; he pleaded guilty to misdemeanor battery for this offense.

Bey committed the three strike priors on two occasions in August 1991. The attempted murder and attempted robbery occurred on August 27, 1991, when Bey and another person approached three males in a parking lot and demanded that they drop their wallets. When one of the victims attempted to back away, Bey fired a gun which struck the victim in the face. The robbery occurred on August 30, 1991, when Bey and another person, using a gun, robbed a woman who was delivering a pizza. Bey and his accomplice took the pizza, some of the woman's personal belongings, and the woman's vehicle. Based on this conduct, Bey pleaded guilty to attempted murder, attempted robbery, and robbery.

Bey was sentenced to 14 years prison for the 1991 felony offenses. He was released from prison on September 7, 1999, and discharged from parole on September 7, 2002. He committed the current robbery on November 5, 2003.

In the proceedings below, Bey argued that the trial court should dismiss his strike priors because the prior convictions were closely connected in time and objective and were part of a "brief period of aberrant behavior"; the strike priors were all resolved in the same proceeding; and he was only 19 years old when he committed the strike priors. Bey posited that he had good prospects for the future. He stated that he loved his wife and children, and he was an accomplished artist who had been involved in numerous governmental and community programs related to the arts and service projects. Bey urged the court to dismiss at least two of the strike prior convictions to avoid imposing a life sentence.

Opposing dismissal of any strike priors, the prosecutor noted that Bey committed another robbery with a firearm only a short period of time (i.e., 14 months) after he was discharged from parole for the same type of conduct. Rejecting Bey's request to strike the strike priors, the court stated that the fact that Bey was in prison for a number of years following the 1991 offenses made the 1991 offenses "relatively fresh" with respect to the current offense, and concluded he should be sentenced under the Three Strikes law.

On appeal, Bey reiterates essentially the same arguments he presented to the trial court, and contends the trial court abused its discretion in not striking at least two of the strike priors.

The record shows no abuse of discretion. Although Bey's strike prior convictions arose from conduct that occurred only a few days apart, the conduct was violent, involved the use of a gun, was directed at four victims, and occurred on two different occasions. This is not a case where the defendant sustained multiple strike prior convictions based on a *single* act. (See *People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8.) About four years after being released from prison and about one year after being discharged from parole, Bey repeated essentially the same type of violent conduct. These circumstances support the trial court's conclusion that Bey is the type of recidivist offender targeted by the Three Strikes law.

V. *Correction of Abstract of Judgment*

The abstract of judgment incorrectly states that Bey was convicted by the court. As recognized by the parties, the abstract should state he was convicted by a jury. The trial court is directed to make this correction.

DISPOSITION

The judgment is affirmed with directions to correct the abstract of judgment as set forth in this opinion. A copy of the amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.